Case No. 21-35746

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BORDEN, individually, and on behalf of all others similarly situated,

Appellant/Plaintiff,

vs.

EFINANCIAL, LLC, a Washington Limited Liability Company

Appellee/Defendant.

On Appeal From The United States District Court
For The Western District of Washington
Case No. 2:19-cv-01430

APPELLANT'S REPLY BRIEF

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INTRODUCTION

eFinancial makes one thing clear: its position is entirely premised on its repeated statement that *Duguid* "clarified the definition of an ATDS" to mean "a device that randomly or sequentially generates a plaintiff's telephone number in the first instance." Answering Brief of Defendant-Appellee ("AB") at 1 (emphasis added); *see also id*. at 4 ("Borden does not allege … that eFinancial … generated his phone number in the first instance"); *id*. at 11 ("the ATDS must be used to generate the phone numbers in the first instance"); *id*. at 18 ("an ATDS must randomly or sequentially generate phone numbers in the first instance").

It is odd, then, that neither the Supreme Court's *Duguid* opinion, nor the appeals court and district court decisions that preceded it, make any mention of "the generation of a telephone number in the first instance," nor do they make use of any such similar terminology. As such, rather than beginning in the context of an entirely new standard of eFinancial's own creation, this final brief instead follows Justice Sotomayor's own guidance -- "We begin with the text [of the TCPA]." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021).

Duguid concerned the statutory construction of the TCPA's definition of an ATDS. *Id* at 1169, citing 47 U.S.C.S. § 227(a)(1) ("The [TCPA] defines an [ATDS] as: 'equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such

numbers."'). Facebook argued that the clause "using a random or sequential number generator" modifies both verbs that precede it ("store" and "produce"), while Duguid argued that the clause only modified the verb "produce." *Id*. The Court's answer was clear:

> We conclude that the clause modifies both, specifying how the equipment must either "store" or "produce" telephone numbers. Because Facebook's notification system neither stores nor produces numbers "using a random or sequential number generator," it is not an autodialer.

Id.

Contrary to eFinancial's tortured misstatement that Borden's interpretation of *Duguid*'s holding is premised on a contextual reading of footnote 7, Borden's interpretation of *Duguid* instead tracks this above-cited holding, rationale, and terminology exactly. As stated in Borden's Opening Brief ("OB") at 15-16:

> As such, the ultimate question in *Duguid* was not whether Facebook "generated" the numbers it called, but whether Facebook used a random or sequential number generator to "store" or "produce" those numbers to be called.
>
> Similarly, the question is not – as argued by eFinancial and the District Court – whether eFinancial "generated" the numbers it called, but whether eFinancial used a random or sequential number generator to "store" or "produce" those numbers to be called.

Rather, it is eFinancial's position, not Borden's, that is premised on a single statement from *Duguid*, and one that does not even constitute any part of the Court's ultimate holding or rationale; that the Court granted cert, in part, to resolve a conflict

"regarding whether an autodialer must have the capacity to generate random or sequential phone numbers." *Duguid*, 141 S. Ct. at 1168. *Duguid* makes no other mention of telephone number generation in the remainder of its opinion, however, and instead answers the question presented to it - whether the clause "using a random or sequential number generator" modifies both verbs that precede it or only one. *Id*. at 1167. Instead, eFinancial ignores the Court's application of canons of judicial interpretation and its exhaustive discussion of the "store" and "produce" functions of using a random or sequential number generator, and concludes, without support, that an ATDS must "generate telephone numbers in the first instance" in order to satisfy *Duguid*, effectively rendering the "store" and "produce" functions superfluous and negating the majority of the discussion in *Duguid* and its holding.

Duguid's ultimate holding is not so simplistic. Faced with conflicting circuit courts that had begun to substitute their own language in interpreting Congress's ATDS definition, *Duguid* found that these courts had deviated too far from the actual statutory text by focusing on the origin of the numbers dialed, and instead refocused its own analysis on the language in the statute itself (whether the numbers were "stored" or "produced" using a random or sequential number generator). *Id*. at 1169-74. Reminding the parties that the judiciary's role is to interpret what Congress wrote - and not rewrite the statute's language to make more "sense" - the Court broke

down the TCPA's definition of an ATDS, providing a clear retort to eFinancial's approach:

> Congress defined an autodialer in terms of [1] what it must do ("store or produce telephone numbers to be called") and [2] how it must do it ("using a random or sequential number generator").

Id. at 1169.

Using a bit of linguistic sleight-of-hand, eFinancial's interpretation (that an ATDS must "generate phone numbers in the first instance") conflates these two distinct properties of an ATDS ("what it must do" vs. "how it must do it"), to ultimately arrive at a conclusion that, to eFinancial, makes the most "sense." And, in eFinancial's view, it makes the most "sense" to add its own function to Congress's definition of what an ATDS must do – it must not only "store or produce telephone numbers to be called," as the statute clearly states, but must also "generate [the] telephone numbers to be called."

This is the exact re-writing approach that *Duguid* and other courts have explicitly warned against. *Id*. at 1173. "The Supreme Court has cautioned federal courts against revising federal statutes." *United States Bank v. Antigua Maint. Corp.*, No. 2:17-cv-01866-APG-NJK, 2019 U.S. Dist. LEXIS 6101 at *6 (D. Nev. Jan. 14, 2019) (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (it is not a federal court's "proper role to redesign" a federal statute)); *see also Gasprom, Inc. v. Fateh*, 500 B.R. 598, 606 (B.A.P. 9th Cir. 2013)

("refus[ing] to read into the text any limiting or qualifying language that Congress chose not to include.").

Furthermore, such an interpretation would relegate the thoroughly discussed storage and production requirements at issue to mere afterthoughts. After all, if eFinancial's interpretation is correct, Congress could have written the ATDS definition much more simply as "equipment which has the capacity to (A) randomly or sequentially generate telephone numbers; and (B) to dial such numbers."

That is not what Congress wrote, nor is it what *Duguid* held, and this Court should reject eFinancial's attempts to rewrite the statute in contravention of *Duguid*'s guidance to add a "telephone number generation" requirement that the Supreme Court considered and explicitly chose not to include in its controlling definition.

ARGUMENT

A. *Duguid* does not rewrite the TCPA to require the "generation of a plaintiff's phone number in the first instance"

eFinancial makes one thing clear– if this Court does not agree that *Duguid* changed the TCPA's definition of an ATDS to require "a device that randomly or sequentially generates a plaintiff's number in the first instance," then the lower court's decision is without foundation and must be reversed. Because such an interpretation contradicts both the plain language of the TCPA as well as *Duguid*'s holding, it should be rejected by this Court.

1. The plain language of *Duguid* establishes that generation of a telephone number is not a necessary function of an ATDS

Central to eFinancial's position is its assertion that the question presented in *Duguid* was "whether an [ATDS] must have the capacity to generate random or sequential phone numbers in the first instance." AB at 4, 11, 18. This is incorrect. Rather, *Duguid* plainly states both the question presented and its ultimate answer:

> The question before the Court is whether [the definition of an ATDS] encompasses equipment that can "store" and dial telephone numbers, even if the device does not "us[e] a random or sequential number generator." It does not. To qualify as an [ATDS], a device must have the capacity either to store a telephone number using a random or sequential number generator or to produce a number using a random or sequential number generator.

Duguid, 141 S. Ct. at 1167.

While *Duguid* does initially reference a circuit conflict regarding whether an ATDS must have the capacity "to generate random or sequential phone numbers," it never discusses the holdings of those cases – whether favorably or unfavorably – and contrary to eFinancial's position, never answers this question in the affirmative, despite ample opportunity to do so. *Id*. at 1168.

The reason for this is demonstrated throughout *Duguid*. Rather than adopting any specific court's holding, *Duguid* makes it clear that these holdings had run too far astray from the plain language of the statute as drafted by Congress. Rather than focusing on the origin of the telephone numbers dialed – a subject not covered by the statute – *Duguid* instead refocused the proper analysis on the language in the

statute itself – whether the telephone numbers dialed were "stored" or "produced" using a random or sequential number generator. *Id*. at 1169-74.

In refocusing its analysis on the plain language of the statute, the very first thing that *Duguid* does is separate Congress's definition of an ATDS into two discrete properties – (1) the required functions; and (2) the tools that must be used. *Id*. at 1169 ("Congress defined an autodialer in terms of what it must do ('store or produce telephone numbers to be called') and how it must do it ('using a random or sequential number generator')") (emphasis supplied).

Duguid's discussion of the first property of an ATDS – what functions it must perform – could not be clearer. An ATDS must have the capacity to perform one of two functions: (1) store a telephone number to be called; or (2) produce a telephone number to be called. *Id*. Notably, *Duguid* does not list the "generation of a telephone number to be called" as one of the required functions of an ATDS, and instead repeatedly frames the question presented and its holding without any reference to the generation of telephone numbers. *Id*. at 1169-70.

Duguid certainly had the opportunity to do so – as eFinancial points out, the Court had already acknowledged a circuit split regarding whether an ATDS must function "to generate telephone numbers" – and instead the Court explicitly chose not to include the generation of a telephone number in its explicit list of required functions of an ATDS. This intentional decision must be given its due weight.

2. eFinancial improperly equates the "use of a number generator" with the "generation of a phone number"

Faced with *Duguid*'s conclusion that the only two required functions are the capacity to (1) store telephone numbers to be called; or (2) produce telephone numbers to be called – and that there is in fact no unstated third requirement that it must also "generate phone numbers to be called" – eFinancial appears to argue that its "phone number generation" requirement is instead derived from the second property of an ATDS – the tools that must be used ("using a random or sequential number generator"), and not the discrete functions that must be performed. *Id*.

This distinction between what kind of equipment must be used, on one hand, and what that equipment "must do," on the other, is crucial to understanding *Duguid*'s plain language interpretation of an ATDS, because when the Supreme Court discusses the phrase "using a random or sequential number generator," to describe what kind of equipment "must be used," it does so in a way that can only be understood to mean that a random or sequential number generator is a tool, which, like all tools, can do a variety of functions. *Id*. at 1169-74. Not all the functions that a random or sequential number generator can perform, however, are included within the definition of an ATDS, which is why *Duguid* takes pains to recognize that Congress explicitly listed the exact functions that constitute an ATDS; namely, to "store" or "produce" telephone numbers. *Id*. at 1169. By conflating the use of a random or sequential number generator with the prohibited functions that a random

or sequential generator must perform, eFinancial ignores *Duguid*'s clear instruction and impermissibly asks this Court to expand on Congress's explicitly stated functions of an ATDS.

The homework-help website example used by the Court – although primarily used to demonstrate the operation of the series-qualifier rule – perfectly demonstrates the importance of this distinction: "Imagine if a teacher announced that 'students must not complete or check any homework to be turned in for a grade, using online homework-help websites.'" *Id*. Online homework-help websites can perform a variety of functions, ranging from providing answers to multiple choice questions to providing narratives for essays to fixing grammatical errors. Crucially, however, a student only violates the rule if they use the online homework-help website to "complete or check any homework to be turned in for a grade." *Id.*

eFinancial's argument that this distinction should be eviscerated fails for several reasons. First, because the limited question presented to *Duguid* was whether the series-qualifier canon of statutory construction operated such that the clause "using a random or sequential number generator" modifies both "store" and "produce," *Duguid* did not have to – nor did it – explicitly define the phrase "using a random or sequential number generator." *Id*. at 1169-70. Again, rather than define a "random or sequential number generator" as a specific device, *Duguid* instead makes it clear that a random or sequential number generator is a tool that can perform

a variety of functions, and gives just one explicit example of how it can be used within the context an ATDS – by "us[ing] a random [or sequential] number generator to determine the order in which to pick phone numbers from a preproduced list" – in other words, exactly how it was used by eFinancial. *Id*. at 1172 n.7.

eFinancial attempts to avoid this clear example of a covered use of a random or sequential number generator by arguing that it "ignores the greater context" of *Duguid*. However, footnote 7's example is entirely consistent with the TCPA's plain language and the rest of *Duguid*'s holding. Consistent with Congress's definition of an ATDS in terms of what it must do ("store or produce telephone numbers to be called") and how it must do it ("using a random or sequential number generator"), *Duguid* finds that using a random or sequential number generator "to determine the order in which to pick phone numbers from a preproduced list" constitutes the covered functions of "storing or producing telephone numbers to be called." *Id*.

Weight must be given to the legal terms and examples used – and not used – by *Duguid* in defining an ATDS. Just as *Duguid* explicitly chose not to include the generation of phone numbers as one of the two required functions of a random or sequential number generator, *Duguid*'s decision to illustrate how a random or sequential number generator can be used to "store or produce telephone numbers to be called" in violation of the TCPA by using the example of a random or sequential number generator "determin[ing] the order in which to pick phone numbers from a

preproduced list" – and not through the use of an example wherein the telephone numbers themselves are explicitly "generated" – must be given weight.[1]

eFinancial's insistence that there is only one way that a random or sequential number generator can be used to violate the TCPA – by "generating the phone numbers in the first instance" – is further contradicted by *Duguid*'s use of the word "might," in its example in footnote 7. *Id*. at 1172 n.7 ("For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list.") (emphasis added). The use of this permissive language reinforces Borden's position that there are a variety of ways in which an ATDS might use a random or sequential number generator to "store" or "produce" telephone numbers for dialing, including, but not limited to, determining the order to pick phone numbers from a preproduced list. *Id*. By interpreting "using a random or sequential number generator" to mean only the "generation of random or sequential phone numbers," and nothing else, eFinancial is ignoring *Duguid*, which makes clear that there are various ways a random or sequential number generator can be used in the process of storing and/or producing telephone numbers.

[1] This is not to say that a random or sequential number generator can never be used to generate phone numbers in a way that violates the TCPA's prohibition, only that for it to do so, it must similarly use a random or sequential number generator to either "store" or "produce" those numbers for dialing.

By using this statutorily consistent framework, *Duguid*, unlike eFinancial, avoids requiring courts to endeavor to draw difficult lines between how much random or sequential telephone number generation is enough to satisfy eFinancial's invented telephone number generation requirement. Much like the Court found that the TCPA should not be interpreted "as requiring such a difficult line-drawing exercise around how much automation is too much," here the TCPA should similarly not be interpreted to require difficult line-drawing exercises around how much random or sequential number generation is needed to sufficiently satisfy eFinancial's invented telephone number generation requirement. *Id.* at 1171 n.6. Following eFinancial's logic, telemarketers would unleash a torrent of defenses claiming that they were not using an ATDS when calling randomly or sequentially generated telephone numbers where only the last seven or four numbers are randomly or sequentially generated (in the case of a static area code and/or prefixes, for instance), or if the preproduced calling list was a hybrid list consisting of both randomly or sequentially generated telephone numbers as well as customer telephone numbers, or periodically scrubbed for bad numbers.

Once the analysis is shifted appropriately to whether the device uses a random or sequential number generator to "store" or "produce" telephone numbers for dialing, the courts are not required to determine how much random or sequential telephone number generation is sufficient, as any use of a random or sequential

number generator is sufficient. Regardless of whether a random or sequential number generator is used to pick the order the telephone numbers are called, generates all ten digits of telephone numbers, or only the last seven or four, or if the list is periodically scrubbed for bad numbers, the device qualifies as an ATDS, provided it stores or produces those telephone numbers to be dialed. [2]

3. eFinancial's rationale for adding a "telephone number generation" requirement was rejected by *Duguid*

It is indisputable that *Duguid* does not state that an ATDS means only "a device that randomly or sequentially generates a plaintiff's telephone number in the first instance." AB at 1-2. It is similarly indisputable that *Duguid* does not state that an ATDS must use a "random or sequential *telephone* number generator" to be an ATDS. *Id*. at 1-2.

Rather than point to anywhere in the statutory text or *Duguid* that would support eFinancial's invented standard," eFinancial instead relies on several non-textual arguments – primarily, that its interpretation of *Duguid* makes the most "sense" when you consider things such as the context of the circuit split in which

[2] *But see Beal v. Outfield Brew House*, Nos. 20-1961, 20-3581, 2022 U.S. App. LEXIS 7748, at *6-7 (8th Cir. Mar. 24, 2022) (Contradicting *Duguid* and conflating using a random or sequential number generator with a non-existent telephone number generation requirement, *Beal* found that produce means to generate in the context of an ATDS, which contradicts the definition of produce in the *Duguid* cited PACE Brief and used in footnote 7, which is to select, retrieve, and provide a number from memory for dialing.).

Duguid was decided (*Id.* at 2, 11, 18-19) and the perceived intent of Congress when drafting the statute. *Id*. at 25.

eFinancial's rationale – that we should interpret the TCPA in accordance with what makes "sense" and not in accordance with its plain language – was the exact rationale rejected by *Duguid*. The Court rejected Duguid's argument that his construction of the statutory text made the most "sense," instead holding that the Court can only interpret what Congress actually wrote, and not substitute its reasoning or logic as to what would make the most "sense" for Congress's own chosen language. *See id.* at 1171 ("The crux of Duguid's argument is that the autodialer definition calls for a construction that accords with the "sense" of the text."); *id.* at 1173 ("Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked"); *id*. ("[there] is no justification for eschewing the [plain language] of the [TCPA]. This Court must interpret what Congress wrote.").

The same rationale applies here. Just as Duguid's non-textual arguments "[could not] overcome the clear commands of [the TCPA]'s text," the fact that *Duguid* did not define an ATDS as eFinancial would have liked – or thinks makes "sense" – is simply no justification for dispensing with *Duguid*'s plain reading of the statute's text. *Id*. at 1171.

4. *Meier II* is consistent with Borden's interpretation of *Duguid*

eFinancial emphasizes one case - *Meier v. Allied Interstate LLC* – an unpublished memorandum disposition from this Court,[3] to support its position that an ATDS "must randomly or sequentially generate phone numbers in the first instance." AB at 10-11 (citing *Meier v. Allied Interstate LLC*, No. 20-55286, 2022 U.S. App. LEXIS 1413 (9th Cir. Jan. 19, 2022) ("Meier II")) ("As in *Meier*, Borden failed to state a claim because he does not allege that eFinancial randomly or sequentially generated his phone number in the first instance.").

Much like its misplaced reliance on *Duguid* for its "telephone number generation in the first instance" standard, eFinancial similarly misstates the holding of *Meier II*, in another attempt to convince this Court to adopt a standard of eFinancial's own creation, using language that simply does not appear in either the statutory text of the TCPA, *Duguid* or *Meier II*.

In *Meier I*, the plaintiff sued a third-party debt collector for calls made to his cellular phone using the LiveVox platform. The lower court, following the guidance

[3] Memorandum dispositions are not precedent or binding, and some courts have declined to recognize memorandum dispositions altogether as providing persuasive authority, as they contain limited analysis. *See* Ninth Circuit Rule 36-3(a); *Villanueva v. California*, 986 F.3d 1158, 1166 n.6 (9th Cir. 2021) (citations omitted); *Scott T. v. Saul*, No. 19-cv-06875-DMR, 2021 U.S. Dist. LEXIS 59746, at *12 (N.D. Cal. Mar. 29, 2021) ("Plaintiff's authority on this point is not persuasive[,] both cases he cites are unpublished memoranda dispositions with limited analysis.") (citations omitted).

of this Court in *Marks*, determined that because "the essential function of an ATDS is the capacity to dial numbers without human intervention," and the defendant's specific use of the LiveVox system "is incapable of 'non-manual' dialing because it requires the intervention of clicker agents, and "thus [was] not an ATDS." *Meier v. Allied Interstate, LLC*, No. 18-CV-1562-GPC-BGS, 2020 U.S. Dist. LEXIS 28249, at *14-15 (S.D. Cal. Feb. 19, 2020) ("Meier I").

During the pendency of the appeal, *Duguid* was decided. Despite eFinancial's best attempts to paraphrase this Court's memorandum disposition to include the "generation of a telephone number in the first instance" standard, it does not. *See Meier II*. Rather, *Meier II* tracks the language of the statute and *Duguid*, pursuant to the Court's express instructions to refocus the analysis on the text of the statute as written, and unsurprisingly, repeatedly frames *Duguid*'s ultimate holding without any reference to the generation of telephone numbers. *See Meier II* at *1 ("[T]he Supreme Court held that an ATDS 'must have the capacity either to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator.").

eFinancial's assertion that Meier's case was dismissed because he did not allege that his phone number had been "generated in the first instance" is unfounded. Instead, *Meier II* plainly states that the defendant did not use an ATDS because it did not use LiveVox to either (1) store numbers using a random or sequential number

generator; or (2) produce numbers using a random or sequential number generator; neither of which involved any discussion of "the generation of phone numbers in the first instance." *Compare Meier II* at *1-3 with AB at 10-11.

In so finding, *Meier II* focused not on the origin of the numbers, or how they may have been "generated," but instead focused on how the numbers are "stored" or "produced" (defined within *Duguid* to mean "select, retrieve, and provide [a] number from memory" for dialing – regardless of how those numbers were originally created or otherwise obtained).[4]

Within this framework, *Meier II* determined that the defendant did not use the LiveVox system as an ATDS, because the telephone numbers called by the LiveVox system were not stored or produced using a random or sequential number generator, but instead were simply stored and automatically dialed in the same order in which they were received. *Meier II* at *3 ("The LiveVox system does not qualify as an ATDS … because it stores [and produces] pre-produced lists of telephone numbers in the order in which they [were] uploaded. Meier's TCPA claims therefore fail.").

This is exactly what distinguishes the calling campaigns and technology used in *Duguid* and *Meier II* from the instant case. Unlike *Meier II*, eFinancial's dialing technology did not merely store pre-produced lists of telephone numbers in the order in which they were uploaded and then "automatically" dial them in the same order;

[4] *See Id*. at 1172, n.7 (*citing* PACE Brief, ER 51).

indeed, as pointed out by *Meier II*, such an interpretation essentially repeats the *Marks* standard, which has been rejected. *See Meier II* at *2 (finding that "under Meier's interpretation," virtually any system that stores telephone numbers and automatically dials them would be an ATDS).

Borden, instead, in accordance with the one example of how a random or sequential number generator may be used provided by *Duguid*, has alleged that eFinancial – rather than merely using a dialer to automatically dial a list of numbers in order without human intervention - used a sequential number generator to determine the order to produce telephone numbers from a database. This conduct explicitly violates *Duguid's* standard.

It is for this same reason that eFinancial's "public policy" arguments based on *Meier II* similarly fail. Unable to find support for its "telephone number generation in the first instance" standard in the text, eFinancial instead falls back on its public policy argument, purportedly citing to *Meier II* to support eFinancial's contention that if this Court declines to read its novel "telephone number generation in the first instance" requirement into the TCPA, then the result would be "classifying almost all cellphones as autodialers." *See* AB at 20-21 ("Dispensing with a requirement of random or sequential generation of the phone numbers, however, would permit cases involving automated use of *any* stored list."). This argument fails for several reasons.

First, it is important to recognize – as many courts have done – that modern cell phones are not phones in the traditional sense and are more akin to small computers that possess more computing power, storage, and functionality than many super computers had when the TCPA was drafted. Given that backdrop, it is important to note that although the Court was concerned about the potential of "ordinary cell phone owners in the course of commonplace usage, such as speed dialing or sending automated text message responses," leading to potential liability under the TCPA, it did not find that all cell phone usage would necessarily be exempt from the TCPA.

Today, entire businesses can be run solely from cell phones, any one of which could use applications on their cell phones to make calls using an artificial voice, a prerecorded voice, or even an ATDS. Much like the Court recognizing that it is an exercise in futility for courts to try to measure the amount of automation needed to escape ATDS liability, *Duguid* did not limit its interpretation of an ATDS to a specific type of device, but rather the simple question of whether telephone numbers to be called are stored or produced using a random or sequential number generator.

Second, *Meier II* did not find that the LiveVox system was not used as an ATDS because it did not "generate phone numbers in the first instance." Instead, *Meier II* found that the LiveVox system was not used as an ATDS because, using the example provided by *Duguid*, it did not use a random or sequential number

generator to determine the order in which to store and produce telephone numbers for dialing, and instead just dialed them automatically in the order they were received. *See Meier II at *2-3*.

It is this missing piece – the use of a random or sequential number generator – that materially differentiates the cases and their public policy implications. *Duguid* makes clear that this intervening step is necessary – the telephone numbers dialed must actually relate to and be used by the system's capacity to either store or produce telephone numbers to be called, using a random or sequential number generator, in order to avoid the concerns raised by *Meier II* and eFinancial.

For example, while it may be true that some cell phones might use a sequential or random number generator to organize a cell phone user's contact list, that type of usage would not implicate *Duguid*, because that intervening step – the use of a sequential or random number generator to pick the order in which the phone numbers are stored, produced, called, or otherwise – is entirely absent. Such ordinary cell phone usage would therefore not run afoul of the TCPA's protections as defined by *Duguid*.[5]

[5] For example, if there are fifty contacts saved in a person's cell phone, and each of those contacts is associated with a number that was sequentially generated, ordered from oldest contact to newest contact, where the first saved contact is associated with number 00001, the second contact is associated with number 00002, and so on, that order is never used in the course of producing a phone number to be dialed. This is critical, because although the phone numbers are sequentially stored, that

5. eFinancial badly misconstrues Borden's alternative "LeadID" argument

Borden has made his position clear: number generation – whether telephone or otherwise – is not a required function of an ATDS. In addition to this primary argument, Borden alternatively argued that, to the extent that this Court finds that number generation is required by *Duguid* or the plain language of the TCPA (despite *Duguid*'s clear decision not to so hold), eFinancial's system does in fact generate random or sequential numbers – called LeadID numbers – that are then used in the storage of corresponding telephone numbers in eFinancial's database. AB at 13-14, 26, 36.

Contrary to eFinancial's suggestion, those LeadID numbers are not representative of the sequential order that the eFinancial Mass Text Advertisements are sent, rather, the telephone numbers are subsequently produced using a sequential number generator that constantly reorganizes the telephone numbers to be dialed based on a number of variables, including set intervals of days. Unlike *Meier II*, this order will never be a mere automatic dialing of the telephone numbers in a list in the same order that they were provided, because each new telephone number obtained will be dialed on intervening overlapping days based on the eFinancial Mass Text Advertisement Sequential Order.

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sequential number ordering is not used in conjunction with the order in which the telephone numbers are produced for dialing.

eFinancial further states that Borden's alternative argument is not "plausibly alleged." AB at 26-28. In response, Borden references and adopts those portions of his Opening Brief which lay out the facts underlying this more-than-plausible explanation of eFinancial's system, rather than repeat them here. *See, e.g.* OB at 13-14, 26, 36 ("eFinancial's ATDS uses a sequential number generator to assemble sequential strings of numbers in a field labeled LeadID … those numbers are then stored and assigned to a telephone number.").

Finally, eFinancial's badly misconstrues this alternative argument to mean that Borden has somehow alleged that LeadID numbers would then have to be dialed, in order to establish that an ATDS was used. Borden never made this argument, and as such, this line of reasoning can be disregarded.

B. eFinancial still fails to establish that it obtained Prior Express Written Consent

Borden has asserted that eFinancial failed to obtain Prior Express Written Consent ("PEWC") because: 1) eFinancial's purported disclosures were not clear and conspicuous; 2) eFinancial's purported disclosures did not inform Borden and the putative class that they were agreeing to the receipt of telemarketing; and 3) Borden and the putative class could not make their website-initiated purchase of life insurance without entering into the purported agreement.

eFinancial does not contest that substantial compliance with these requirements is insufficient and that ***full compliance*** is required. AB at 38-39.

Instead, it states that the law rejecting substantial compliance defenses is "inapposite," because eFinancial "fully" complied with all the requirements. As an example, eFinancial argues that even though it did not inform Borden that he would be receiving telemarketing, as is required, eFinancial came close enough, because it instead "us[ed] language that is accurate and easy for consumers to understand." *Id.*

This is a substantial compliance argument. Regardless of how many times eFinancial writes the phrase "fully complied," its argument that its disclosure language satisfies the PEWC requirements because it came close enough in its choice of substitute language is the quintessential substantial compliance argument. Because eFinancial still fails to establish that it fully complied with all the PEWC requirements, it may not enjoy the benefits of the affirmative defense.

1. eFinancial's relies on an inapplicable standard in arguing that its disclosures were clear and conspicuous

eFinancial's primary support for its position that its disclosures are clear and conspicuous as a matter of law is that "Courts have regularly found disclosures to be sufficiently clear and conspicuous to result in a valid agreement, as a matter of law, where they are similarly placed [to eFinancial's disclosures]." AB at 31 (emphasis added). The problem with this approach is that it conflates the TCPA's clear and conspicuous standard with general contract interpretation – Borden is not arguing the general enforceability of the Agreement (nor need he), and the FCC has established that the standard for a telemarketer to obtain enforceable PEWC is a

heightened requirement that goes above and beyond the enforceability of contracts. *Sullivan v. All Web Leads, Inc.*, No. 1:17-cv-01307, 2017 U.S. Dist. LEXIS 84232, at *21 (N.D. Ill. June 1, 2017) (The "TCPA's **heightened** 'clear and conspicuous' disclosure requirement govern[s] prior express written consent agreements.") (emphasis added).

It does not matter for purposes of PEWC whether there is a valid agreement if the purported agreement does not fully comply with the Clear and Conspicuous disclosure requirements. Therefore, the various cases eFinancial relies on in this context are inapplicable, because whether a disclosure is reasonably conspicuous to be deemed a binding arbitration agreement has no relevance to whether a disclosure is Clear and Conspicuous. *See* AB at 31-35 (citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017) (the enforceability of an arbitration provisions); *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020) (mem. Disposition) (same)).

eFinancial's attempts to distinguish *Barrera* and *Sullivan* are similarly unavailing. *See Barrera v. Guaranteed Rate, Inc.,* No. 1:17-cv-05668, 2017 U.S. Dist. LEXIS 175223 (N.D. Ill. Oct. 23, 2017). The critical analysis is whether the notice would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. First, eFinancial makes the patently false assertion that its disclosure is similar in size and color as the rest of the web form, when, in reality, it is much smaller and light grey, as opposed to the larger,

bolded font that is used for the prompts Borden filled in.

Then, eFinancial attempts to distinguish *Barrera* and *Sullivan* by arguing that in its disclosures, unlike the ones in those cases, are slightly closer to the button. AB at 36-37. But as demonstrated by the *Barrera* and *Sullivan* disclosures reprinted below, eFinancial's disclosures are not apparent to a reasonable consumer given the fact that all three are difficult to read, let alone stand out. Moreover, unlike the *Barrera* and *Sullivan* disclosures, eFinancial's disclosure is comingled with "other disclosures" - the fact that it provides quotes from other insurers on the website - in contradiction to the mandates of the regulation. *See* 64.1200(f)(3) (Clear and Conspicuous disclosures must be "separate and distinguishable from … other disclosures."). Below is each disclosure, as they appear in the relevant filings, reproduced without modification:

By clicking the "Get your free quote" button above you are providing express consent to receive calls from or on behalf of Guaranteed Rate, our family of companies, or one of its third party associates to any telephone number you entered, even if it is a cellular phone number or other paid service for which the called or messaged person(s) could be charged for such call or text message. You provide your express written consent for Guaranteed Rate, Inc. to contact you via any means, including by use of an automated telephone dialing systems and artificial; pre-recorded voice messaging in connection with calls; or texts (SMS and MMS) made to any telephone number you provide, even if your telephone number is currently listed on any do not contact E-mail list, internal, corporate, state, or federal Do Not Contact list. Consent is not required as a condition of utilizing Guaranteed Rate's services and you may choose to be contacted by an "individual customer care representative(s)" by Guaranteed Rate at any time click here; or by calling (866) 332-4705; or by utilizing our services at Loan Options. You may opt-out of receiving calls or other electronic communications at any time by emailing us a Do Not Call Request. If you prefer to be reached at another phone number other than your cellular phone, or any other number given the above, click here

Barrera, No. 1:17-cv-05668 (N.D. Ill. Aug. 3, 2017), D.E. 1 (Complaint) at 8.

By clicking "Submit" I provide my signature, expressly authorizing up to eight insurance companies or their agents or partner companies to contact me at the number and address provided with insurance quotes or to obtain additional information for such purpose, via live, prerecorded or autodialed calls, text messages or email. I understand that my signature is not a condition of purchasing any property, goods or services and that I may revoke my consent at any time.

Sullivan, No. 1:17-cv-01307 (N.D. Ill. Feb. 21, 2017), D.E. 1 (Complaint) at 8.

AB at 35.

As evident from this visual comparison, eFinancial's disclosure is the most difficult to read of the three, is not bold like the *Barrera* disclosure, does not use a contrasting background like the *Sullivan* disclosure, and is in fact, light grey on a white background, which makes it blend into the background. As such, just as the *Sullivan* and *Barrera* disclosures, as alleged, were found insufficient to meet the TCPA's heighted Clear and Conspicuous standard, this Court should find that eFinancial's purported disclosure, as plead, similarly fails the test.

eFinancial references one other outlier case, *Morris v. Modernize, Inc.*, No. AU-17-CA-00963-SS, 2018 U.S. Dist. LEXIS 232701 (W.D. Tex. Sep. 27, 2018). Here, eFinancial again conflates the PEWC standard with a less exacting one; *Morris* was based on Do-Not-Call Registry violations, which has a completely different standard than PEWC for permitting calls to be made ("the recipient subsequently provides prior express invitation or permission to the sender"), encompasses both residential and cellular telephones and telemarketing and non-telemarketing calls, and can be satisfied by simply providing a caller with a phone number on a web form, and is therefore inapposite here. *See Johansen v. eFinancial, LLC*, No. 2:20-cv-01351-DGE, 2022 U.S. Dist. LEXIS 8798, at *7-8 (W.D. Wash. Jan. 18, 2022)

(citing *Morris v. Modernize, Inc.*, among others).[6]

2. eFinancial's substantial compliance argument does not satisfy the PEWC requirement to inform recipients that they are agreeing to the receipt of telemarketing

As described above, eFinancial admits that it did not use the required language in its disclosure and does not contest Borden's position that substantial compliance is insufficient. Instead, it insists that even though it did not inform Borden that he would be receiving telemarketing, as is required, eFinancial came close enough, because it instead "us[ed] language that is accurate and easy for consumers to understand." *Id.*; *see* AB at 38-39.

This is a textbook substantial compliance argument; they are asking this Court to find that "offers of insurance" is substantially close enough to "encouraging the purchase" to fit within the definition of Telemarketing under the TCPA. But the PEWC requirements do not state that the agreement must inform the person signing that they are agreeing to "something that may fit within the definition of telemarketing." Rather, it specially states that the person signing the agreement must be informed that they are agreeing to the receipt of telemarketing calls.

[6] While it is true that *Morris* does use the phrase "PEWC" in explaining the relevant standard in its Do-Not-Call-Registry case, the standards are in fact significantly different, and the citations that *Morris* relies on involve arbitration agreements, and not PEWC agreements pursuant to the TCPA. As such, although *Morris* uses PEWC language, it does not apply the heightened standard under the TCPA for Clear and Conspicuous disclosures and is not binding on this Court or any other court regarding PEWC issues. *See Morris*, 2018 U.S. Dist. LEXIS 232701, at *7 n.5.

In sum, eFinancial did not fully comply, does not contest that full compliance is the appropriate standard, but is still asking this Court to find that it substantially complied by using the phrase "offers of insurance." This attempt to skirt the PEWC rules should be rejected.

3. eFinancial admits it required consent as a condition of Borden's website-initiated purchase of life insurance

With regards to the final PEWC requirement, eFinancial again does not contest Borden's allegation that it conditions website-initiated purchases of life insurance on providing consent. *See* AB at 39-40. Instead, eFinancial asserts without any support that it is permitted to deny a consumer the ability to buy website-initiated purchases of life insurance, provided it permits them to purchase life insurance over the phone. For all the reasons stated in the Opening Brief, this is a direct violation of the PEWC requirements, as eFinancial is conditioning website-initiated purchases of life insurance on providing consent, and there is no way to make such a purchase without consenting. AB at 53-56.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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FOR THE NINTH CIRCUIT

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